Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 2 and 15 of the	)	ET Docket No. 98-76
Commission's Rules to Further Ensure	)	RM-9022
That Scanning Receivers Do Not	)	
Receive Cellular Radio Signals	)	

REPLY COMMENTS OF BELL ATLANTIC MOBILE, INC.

Bell Atlantic Mobile, Inc. (BAM) submits these reply comments in support of the Commission's Notice of Proposed Rulemaking in this proceeding (Notice). The Notice proposes modifications to the Commission's Rules that will strengthen the prohibitions against unauthorized use of scanning receivers. The Commission's objectives are fully consistent with the clear public interest in safeguarding cellular subscribers' privacy.

Nearly all of the comments support the Notice and agree that new rules should be adopted as promptly as possible so that current loopholes are closed. One commenter, however, claims that the proposals are unconstitutional because they would interfere with a purported First Amendment "right to listen" to cellular calls. Comments of Yaesu Musen Co., Ltd. (Yaesu). This argument is frivolous. As a manufacturer of communications receivers, Yaesu has an obvious business interest in having the Commission "terminate this proceeding without adopting any of the

NPRM's proposals." Comments at ¶ 51. Yet this interest does not justify advancing clearly incorrect constitutional arguments. Yaesu's seriously flawed comments should not be permitted to distract the Commission from quickly completing this proceeding and adopting stronger rules to protect cellular customer privacy.

Yaesu argues that the Commission cannot constitutionally prohibit individuals from using receivers to intercept cellular communications, because individuals have a First Amendment right to access all communications transmitted over the electromagnetic spectrum, including those transmitted over the frequencies allocated to cellular service. There is absolutely no support for such an argument.[1]

To the contrary, federal courts have consistently held that an individual has no First Amendment right to eavesdrop on a communication simply because it is transmitted over the radio spectrum. *See,* e.g., *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829, 849 (11th Cir. 1990) ("In the context of communications law, a First Amendment right of access to transmitted signals argument has been rejected as to subscription television"); *California Satellite Systems v. Seimon*, 767 F.2d 1364, 1367 (9th Cir. 1985) (no First Amendment right of access to public radio signals); *cf. United States v. Weiner*, 701 F. Supp. 14, 16 (D.Mass. 1988) (no unabridgeable First Amendment right to broadcast).

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[1] Yaesu principally relies on *Reno v. American Civil Liberties Union*, 117 S.Ct. 2329 (1997), a case which is inapposite here. In *Reno*, the Supreme Court struck down as vague the content-based blanket prohibition on indecent materials enacted by the Communications Decency Act (CDA). The CDA did not attempt to regulate the interception of radio communications.

Surreptitious listening to cellular calls (and other wireless communications) has long been prohibited by the Electronic Communications Privacy Act of 1986 (ECPA), 18 U.S.C. § 2511(1)(a), which criminalizes the intentional, unauthorized interception of any electronic communication. Moreover, the Communications Act and the Commission's rules prohibit the manufacture and importation of scanning receivers that are capable of receiving cellular communications.[2] Yaesu does not cite any challenge to the constitutionality of these statutes or rules, claim they are invalid, or suggest that it has ever opposed them. This rulemaking merely implements the purpose of those provisions; it does not intrude on any cognizable constitutional right.

Yaesu presumes that because certain cellular calls may be intercepted and because many scanners are already in commerce, cellular callers have no privacy expectation, and thus attempts to restrict scanning devices are unconstitutional. This is equally frivolous. One of ECPA's purposes was to safeguard the privacy of cellular calls by granting wireless communications the same protections as landline communications. Congress identified the clear governmental interest in prohibiting the interception of cellular communications, and consequently, the devices that enable individuals to do so: "the need for protection of privacy interests." S. Rep. No. 99-541 at 8, 1986 U.S. Code Cong. & Admin. News 3555, 3562. It criminalized the interception of cellular communications with the expectation that "the future

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[2] *See* 47 U.S.C. § 302(d); 47 C.F.R. §§ 2.1033, 15.37, and 15.121.

design and manufacture of scanners will take into account the privacy protection accorded cellular telephony in this legislation." H.R. Rep. No. 647 at 32. The courts have upheld this effort as essential to protecting privacy rights. "Eavesdropping invariably involves a 'broad' intrusion on privacy and must be 'carefully circumscribed.'" *United States v. D'Aquila*, 719 F. Supp. 98, 110 (D.Conn. 1989), *citing Berger v. New York*, 388 U.S. 41, 56 (1967).

Moreover, the Commission's proposed rules would not impair an individual's ability to use a receiver to intercept transmissions that are "readily accessible to the general public." 18 U.S.C. § 2511(g)(1)(i). The Senate Report on ECPA makes clear that cellular communications are not "readily accessible to the general public" and that cellular customers have a reasonable expectation of privacy. 1986 U.S. Code Cong. & Admin. News at 3561, 3563. The Senate expressly rejected arguments by "[s]canning enthusiasts" that the monitoring of cellular telephone calls should not be illegal. *Id.* at 3561. *See Edwards v. State Farm Insurance Company*, 833 F.2d 535, 540 n. 9 (5th Cir. 1987) (recognizing that ECPA creates reasonable expectation of privacy for cellular communications); *Shubert v. Metrophone, Inc.*, 898 F.2d 401 (3d Cir. 1990) (purpose of ECPA was to make clear that cellular communications were entitled to be safeguarded against interceptions).

The Commission should also not be distracted by Yaesu's other arguments against changes in the rules, which are not supported by the record. For example, Yaesu's objections to the 38 dB image rejection level proposed by Uniden are not shared by any other manufacturers of receiving equipment, which support that rule

change. See Comments of Consumer Electronics Manufacturers Ass'n at 2. Indeed one of the largest equipment retailers reports that it already requires its suppliers to meet that standard. Comments of Tandy Corporation at 3. Nor is Yaesu's claim that the proposed rules would unlawfully deny individuals some right to listen to cellular calls supported by the only commenting party which represents receiver users, the American Radio Relay League, Incorporated. While the League asks for certain rule changes to ensure that reception of non-cellular transmissions not be inadvertently prohibited, it expressly agrees with the Commission's goal to prohibit interceptions of cellular calls. The League specifically notes that receivers should not have the capability to access those communications.

The rulemaking proposals will help prevent unlawful interceptions and the resulting injury to privacy. BAM urges the Commission to conclude this proceeding and strengthen the anti-scanning receiver rules as promptly as possible.

Respectfully submitted,

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